

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. AND C.S., FOR THEIR
MINOR DAUGHTER H.S.
Plaintiffs

V.

SILSBEE INDEP. SCH. DIST.,
SUP'T. RICHARD BAIN, JR.,
PRIN. GAYE LOKEY, SISSY
McINNIS, DAVID SHEFFIELD,
CHRISTIAN ROUNTREE, and
RAKHEEM BOLTON
Defendants.

[illegible]

C.A. NO. 1:09-cv-374

DEFENDANTS' MOTION TO STRIKE
AND
DEFENDANTS' OPPOSITION TO PLAINTIFFS' OPPOSED [SECOND] MOTION
TO STAY ENFORCEMENT OF DISTRICT COURT'S ORDERS,
DOCUMENTS 64 AND 65 ASSESSING AGAINST PLAINTIFFS
ATTORNEY'S FEES AND COSTS PENDING APPEAL,

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants Silsbee Independent School District, Richard Bain, Jr., Gaye Lokey, and Sissy McInnis by their attorney, and make and file this Defendants' Motion to Strike and Defendants' Opposition to Plaintiffs' Opposed [Second] Motion to Stay Enforcement of District's Court's Orders, Documents 65 and 65 Assessing Against Plaintiffs Attorney's Fees and Costs Pending Appeal, and would show unto the Court:

1. On March 17, 2010, the Court ordered Plaintiffs to pay to Defendants Gaye Lokey (Silsbee ISD High School Principal) and Sissy McInnis (Silsbee ISD teacher/cheerleader sponsor) \$13,950.00 in attorney fees and \$313.64 in taxable costs. [Clerk's Docket No. 64].

2. Also, on March 17, 2010, the Court ordered Plaintiffs to pay to Defendants Silsbee ISD and Richard Bain \$23,892.50 in attorney fees and \$747.50 in taxable costs. [Clerk's Docket No. 65].

3. By order dated March 17, 2010 the Court denied Plaintiffs' motion, filed March 3, 2010 [Clerk's Docket No. 59], to stay the award of attorney fees and costs to these four Defendants pending appeal. [Clerk's Docket No. 66].

4. On March 29, 2010, Plaintiffs filed their Opposed [Second] Motion to Stay Enforcement of District Court's Orders, Documents 64 and 65 Assessing Against Plaintiffs Attorney's Fees and Costs Pending Appeal. Plaintiffs' second motion, made without first obtaining leave of court, is primarily an effort to replead Plaintiffs' case on the merits, despite the Court's order entered October 7, 2009, granting Defendants' motions to dismiss with prejudice [Clerk's Docket No. 43], and the Court's entry of final judgment against Plaintiffs and closure of the case on October 21, 2009 [Clerk's Docket No. 45].

5. In an effort to persuade the Court to revisit its denial of Plaintiffs' motion to stay the award of attorney fees and costs pending appeal [Clerk's Docket No. 66], and to plead for waiver of a supersedeas bond required to appeal those awards, Plaintiffs allege (pp. 14-18) that Plaintiffs John and Jane Doe are the parents of three children, grandparents of one, all of whom are alleged to live with Mr. and Mrs. Doe; that Mrs. Doe is an elementary school teacher employed by Defendant SISD, earning approximately \$32,000 annually; and that Mr. Doe has "... drawn his earlier earned retirement to pay start-up and those expenses ... relating to his lawn care business." A "verification" by Plaintiff John Doe is included with the restated motion.

6. Defendants aver that Plaintiffs' explanation as to why they cannot post a supersedeas bond to appeal the award of attorney fees and costs is insufficient to establish entitlement to waiver, and is untimely, in that no waiver was claimed and none of the referenced information – albeit insufficient – was provided to the Court in Plaintiffs' prior submission opposing the attorney fees and costs award and moving for stay pending appeal. [Clerk's Docket No. 60].

7. Defendants aver that Plaintiffs have failed to meet the burden imposed upon them by FRCP 62, and decisional authority, requiring the establishment of undue hardship which prevents them from posting a supersedeas bond. As noted in *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979):

“...[A] court ... should place the burden on the moving party to objectively demonstrate the reasons for such a departure [from a full security supersedeas bond] ... It is not the burden of the judgment creditor to initiate contrary proof.”

8. Accordingly, Defendants aver that Plaintiffs' second motion to stay, and their request for waiver of supersedeas bond, should be denied.

9. As noted, Plaintiffs' restated motion to stay is in fact an attempt to replead Plaintiffs' claim on the merits by means of the reassertion of allegations dismissed with prejudice by the Court, on October 7, 2009 [Clerk's Docket No. 43] and in final judgment on October 7, 2009. (Clerk's Docket No. 48).

10. Accordingly, Defendants aver that Plaintiffs' Opposed [Second] Motion to Stay Enforcement of District Court's Orders, Documents 64 and 65 Assessing Against Plaintiffs Attorney's Fees and Costs Pending Appeal should be stricken from the record for

all purposes, as being an untimely and inappropriate attempt to supplement the record long after the case has been closed.

WHEREFORE, PREMISES CONSIDERED, Defendants Silsbee ISD, Richard Bain, Gaye Lokey, and Sissy McInnis pray that Plaintiffs' Opposed [Second] Motion to Stay Enforcement of District Court's Orders, Documents 64 and 65 Assessing Against Plaintiffs Attorney's Fees and Costs Pending Appeal be, in all things, DENIED; that Plaintiffs be required to post the requisite supersedeas bond in order to process an appeal on the award of attorney fees and costs; and that Plaintiffs' Opposed [Second] Motion to Stay Enforcement of District Court's Orders, Documents 64 and 65 Assessing Against Plaintiffs Attorney's Fees and Costs Pending Appeal be stricken from the record on the ground that it constitutes an attempt to replead, without leave, five months after Plaintiffs' suit was dismissed with prejudice, final judgment entered, and the case closed, and for such other and further relief as to which these Defendants shall show themselves entitled.

Respectfully submitted,

WELLS, PEYTON, GREENBERG
& HUNT, L.L.P.

/s/ Tanner T. Hunt, Jr.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2010, this document was electronically filed with the Clerk of the Court of the U.S. District Court, Eastern District of Texas, using the electronic filing system of the Court. The electronic filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice by electronic means, in compliance with Local Rule CV-5(a) of the U.S. District Court of the Eastern District of Texas.

/s/ Tanner T. Hunt, Jr.

Tanner T. Hunt, Jr.